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FEDERAL REGULATION THROUGH THE JOINT EMPLOYMENT OF THE POWER OF TAXATION AND THE SPENDING POWER

BY
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FEDERAL REGULATION THROUGH THE JOINT EMPLOYMENT OF THE POWER OF TAXATION AND THE SPENDING POWER

This report on Federal Regulation Through the Joint Employment of the Power of Taxation and the Spending Power was prepared by Mr. Victor E. Cappa as a study of the Legal Research Section, Mr. George W. Kretzinger, Jr., in charge.

This study was begun shortly after the Schechter decision when plans for new industrial legislation within the limits of that decision were under consideration. The original purpose was to state the legal case for such legislation as authoritatively from the standpoint of its possible proponents as constitutional limitations and precendents permit. In so far as the report retains the flavor of a brief written in support of a client's case, it is only because, in the opinion of the writer, such legislation as is indicated herein will stand the test of the Supreme Court. Obviously legislative policy - whether any such statutes should or should not be enacted - is not within the province of this work; although specific forms or methods have been necessarily adduced as examples.

L. C. Marshall
Director, Division of Review

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SUMMARY OF FINDINGS

The Supreme Court has sustained many taxing statutes whose primary purpose was regulatory rather than revenue raising. Other statutes of this type have been invalidated, particularly the child labor tax. The general principle of the decided cases is that the courts will not inquire into the collateral motives of Congress in enacting such measures where they do not disclose on their face any greater regulatory scheme than is incidental to the collection of the revenue to be raised thereby.

Slight differences have sufficed as bases of classification for tax purposes. Thus differences of social and economic consequences have been held to be sufficient.

It is believed that the economic and social consequences in periods of depression of certain labor practices such as the employment of child labor, the payment of sub-standard wages and the employment of laborers more than a reasonable maximum of hours may justify bases of classification for tax purposes.

The objections of the Supreme Court in the Child Labor Tax Case and in other cases may be met by a simply drawn statute which contains no recital of purposes, cases of classification or detailed regulatory scheme beyond that incidental to the collection of the tax and which eliminates any penalty element and is directly proportioned to the extent of the privilege taxed and the frequency of its use.

The type of taxes which may be utilized either singly or in conjunction with the others for regulatory purposes to achieve N.R.A. purposes are:

First: A tax of 25 per cent on that part of payrolls which represents payments to children under fourteen years of age; second, a tax of 20 per cent on that part of payrolls which represents child labor between fourteen and sixteen years of age; third, a tax of 25 per cent on the differential between the sub-minimum wage paid to each employee and a minimum living wage determined administratively; and fourth, a tax of 50 per cent on that portion of payrolls which represents compensation for services rendered in excess of certain maximum hours of labor similarly determined.

In addition a federal bounty system may be inaugurated to make payments to complying units of industry or grants-in-aid to the states to finance the cost of administration of state N.R.A. agencies, or to be their educational funds, on condition that they enact such social legislation as has been sustained by the Supreme Court in cases like Bunting v. Oregon (ten hour day for all employees of mills, factories, and manufacturing establishments), Holden v. Hardy, etc. The monies for these bounties can be raised by extending the present list of excises on the sale or use of certain commodities to include others, perhaps even to the extent of a general sales tax. These monies would be paid into the general treasury and then disbursed by a separate appropriations bill.

The importance of having two separate bills is that under the doctrine of the companion cases of Massachusetts v. Mellon and Frothingham v. Mellon (infra) a taxpayer cannot attack a spending bill, as his interest in the treasury funds is too remote. The device of two bills keeps that interest remote.

While there is some possibility that the Supreme Court may read these bills together, it is believed that the disinclination of that Court to pass on the spending power together with the rule of construction consistently adhered to by it in cases involving the validity of tax statutes makes it improbable that it will do so.

The device may be further used to secure compliance with N.R.A. standards as follows: A taxing bill would levy a five to ten per cent tax on the gross profits of all industry which tax would be remitted by a separate appropriation bill to those units of industry which comply with federal standards administratively determined. Ancillary devices such as the denial of the right to deduct sub-minimum wages may also be employed in aid of the main plans.

ARGUMENT

A. JUDICIAL LIMITATIONS ON REGULATORY TAXING STATUTES AND ON THE RESERVED POWERS OF THE STATES

There are numerous instances where the Supreme Court has sustained taxing statutes whose primary purpose was to effect certain social, economic or moral objectives and whose secondary aim was to raise revenue. Other statutes actuated by similar regulatory motives have been striken down by the highest court as in excess of the Federal power.

The general principle of these cases is that the courts will not inquire into the collateral motives of Congress in the enactment of measures which on their face disclose no greater regulatory scheme than is incidental to the collection of the revenue intended to be raised thereby.

Taxing measures with undisclosed, or only partially disclosed, regulatory intent which have been sustained by the Supreme Court of the United States are: A tax of ten per cent on state bank notes to drive these notes out of existence (Veazie Bank v. Fenno, 75 U.S. 535), a tax on foreign built yachts to discourage the use thereof (Billings v. U.S., 232 U.S. 261), special taxes on oleomargarine and butter substitutes to encourage the dairy industry (Magnano Co. v. Hamilton, 292 U.S. 40; McCray v. U.S. 27; In re Kolloch, 165 U.S. 526), special excises on lotteries, liquor and narcotic dealers to suppress and regulate these businesses (U.S. v. Doremus, 249 U.S. 86; License Tax Cases, 5 Wall. 462), and more recently a graduated tax on the number of stores or business units to discourage chain stores and inordinate multiplication of units (Liggett Co. v. Lee, 288 U.S. 517; State Board of Tax Commissioners v. Jackson, 283 U.S. 527).

Statutes with disclosed regulatory schemes bearing little, if any, regulation to the collection of the tax which have not succeeded in running the gauntlet of the highest court are the famous child labor tax case (Bailey v. Drexel Furniture Co., 259 U.S. 20), where a special tax was imposed only on the employers of child labor; and the futures trading act case (Hill v. Wallace, 259 U.S. 44), where a tax was imposed on all contracts for future delivery of grain. The regulatory schemes in both of these cases were very elaborate and went far beyond that purely incidental restraint and regulation which a tax must necessarily involve.

These two cases clearly chart the course which regulatory tax legislation must take to avoid being wrecked on the reefs of the Tenth Amendment which confirms the residuum of powers in the State governments.

In the Child Labor Tax Case, supra, the validity of Title XII of the Revenue Act of 1919 was involved. This title imposed an excise tax of ten per cent on the entire net profits received from the sale or disposition of the product of mines, quarries, mills, canneries, workshops, factories or manufacturing establishments in which children under certain ages were employed. The tax was levied only on the employers of child labor. In holding that the act on its face was designed to penalize and thereby to discourage conduct (the employment of child labor) within the regulatory power of the States, the court speaking through Chief Justice Taft said at Page 38:

"The difference between a tax and a penalty is sometimes difficult to define and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both a tax and penalty the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them be making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrong doing and imposing its principle consequence on those who transgress its standard."

In Hill v. Wallace, 259 U.S. 44, a complete regulatory scheme on boards of trade through the supervision of the Secretary of Agriculture was incorporated into a taxing measure. The Future Trading Act of 1921 imposed a tax of 20 cents a bushel on all contracts for the sale of grain for future delivery, but excepted from its application sales on boards of trade designated as contract markets by the Secretary of Agriculture, on fulfillment by such boards of certain conditions and requirements set forth in the act. These requirements were addressed to the elimination of undesirable practices in the sale of grain. They provided for admission to membership on the Board and all its privileges of any authorized representative of any lawfully formed cooperative associations of producers, the prevention of manipulation of prices or the cornering of any grain by dealers or operators upon such board, the adoption and enforcement of rules requiring members to make and keep memoranda of all transactions in grain, whether for cash or for future delivery, the prevention of the dissemination of false, misleading or inaccurate reports concerning crop or market information or conditions that affected or tended to affect the price of commodities, and the location of such boards at terminal markets where there was a recognized official weighing and inspection service and where cash grain was sold in sufficient amount and under such conditions as to reflect the value of grain in its different grades.

No board of trade was required to become a contract market but the inducement of complete exemption from the tax was held out to all boards of trade in order to compel their acceptance of the designation as a contract market. This designation could be had only through making the rules of the board and the conduct of its business conform to the prescribed requirements.

The court held that it was impossible to escape the conviction from a full reading of the law (the title of the act recited not only the tax purpose but that of regulation of boards of trade) that the manifest purpose of the tax (considered most burdensome by the court since it varied according to the price and character of the grain from 15 per cent of its value to 50 per cent, compared to the tax on the same contracts for future delivery under the Revenue Act of only 2 cents upon $100 of value), was to compel boards of trade to comply with the regulations, many of which could have no relevancy to the

collection of the tax at all. The act in essence and on its face was a complete regulation of the boards of trade with a penalty of 20 cents a bushel on all futures to coerce boards of trade and their members into compliance. This purpose was declared in the title to the bill, was clear from the effect of the provisions of the bill, was confirmed by the elaborate machinery for hearings by the Secretary and an administrative commission on violations of the regulations, and the withdrawal by the commission of the designation of the board as a contract market, and the imposition of the penalty of a denial of trading privileges upon violators of the regulations.

The Solicitor General of the United States in the Child Labor Tax Case, supra, laid great stress in his brief on the argument that taxes rarely are levied solely with reference to fiscal necessities but that the social, economic, and moral effects of the tax, and all the varying influences upon the public welfare that such a levy incidentally entails, are more influential considerations than the mere raising of revenue. He cited the cases referred to in paragraph 3 hereof. The court, however, in both this and the Future Trading Act case distinguished these cases on the ground that in none of them did the law objected to show on its face detailed regulation of a concern wholly within the police power of a State, with a heavy exaction to promote the efficiency of such regulation. This distinction must be taken as fundamental.

The Narcotic Drug Act involved in United States v. Doremus, 249 U.S. 86, did, however, on its face show a regulation of matters of local concern. This was probably the broadest regulatory scheme annexed to a tax measure which has been sustained by the Supreme Court. The Act imposed a special tax on the manufacture, importation and sale or gift of opium or cocoa leaves or their compounds or derivatives. Every person subject to the tax was required to register with the Collector of Internal Revenue his name and place of business, and was forbidden to sell except upon the written order of the person to whom the sale was made on a form prescribed by the Commissioner of Internal Revenue. The vendor was required to keep the order for two years, and the purchaser to keep a duplicate for the same time and both were to be subject to official inspection. Similar requirements were made as to sales upon prescriptions of a physician and as to the dispensing of such drugs directly to a patient by a physician. The provisions for subjecting the sale and distribution of the drugs to official supervision and inspection were held to have a reasonable relation to the enforcement of the tax.

Any hopes predicated on the Doremus Case that broad regulatory measures might be sustained were temporarily shaken by the fact that the Supreme Court subsequently in U.S. v. Daugherty, 269 U.S. 360, expressed the opinion that such cases as Hammer v. Dagenhart, 247 U.S. 251 (1918), Child Labor Tax Case supra (1922), Hill v. Wallace, supra (1922), and Lindner v. U.S., 268 U.S. 5 (1925) (all except the Dagenhart Case decided after the Doremus Case) might necessitate a review of the constitutionality of the Anti-Narcotic Act if that question were thereafter properly presented. However, in Alston v. U.S., 274 U.S. 289, 47 Sup. Ct. Rep. 634 (1927), the court sustained the act again, holding that Congress under its power to lay taxes might impose a tax on drugs and declare it unlawful to purchase or sell them except in or from original stamped packages.

Little guidance is found in the most recent of the "collateral" taxes, as these do not follow the pattern of the Narcotic Drug Act but are in form plainly taxing acts with nothing in their terms to suggest that they are intended to be anything else. Thus in Magnamo Co. v. Hamilton (1935) 292 U.S. 40, an excise tax of 15 cents per pound on all butter substitutes sold in the State of Washington was upheld though the motive behind it was admittedly to benefit the dairying industry by burdening oleomargerine. The court said at page 44:

> "Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry. McCray v. U.S. supra, 58-59."

And at page 47:

> "From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional powers of the law-makers to realize by legislation directly addressed to their accomplishment."

The Magnamo Case was subsequently cited by the Supreme Court to sustain the state chain store taxes, the most recent type of "collateral intent taxes" to come before it. These are graduated taxes based on the number of stores or units of business operated by the taxpayer. The tax may be made so heavy as to discourage multiplication of the units to an extent believed inordinate and thus by the incidence of the burden cause other forms of industry to develop. Fox v. Standard Oil Co. of N.J., 55 S. Ct. 333 (chain store tax); Quong Ying v. Kirkendall, 223 U.S. 59, 32 S. Ct. 192, 56 L. ed. 350 (license tax on hand laundries); Liggett Co. v. Lee, 268 U. S. 517, 53 S. Ct. 481, 77 L. ed. 929 (chain store tax); State Board of Tax Commissioners v. Jackson, 283 U.S. 527, 51 S. Ct. 540, 75 L. ed. 1248 (chain store tax); American Sugar Refining Co. v. Louisiana, 179 U.S. 89, 21 S. Ct. 43, 45 L. ed. 102 (license tax on sugar and molasses refiners); Southwestern Oil Co. v. Texas, 217 U.S. 114, 30 S. Ct. 496 (occupation tax on wholesale dealers in certain articles.)

It is apparent from the foregoing that "collateral intent" taxing statutes have run the high court gauntlet only where the collateral regulatory motives were concealed from judicial view by an astute failure to incorporate them into the bill, or to refer to them in the title of the bill, or in the whereas clauses, or in the declaration of policy. Where a disclosure was unavoidable through the necessity of declaring the regulations sought to be enforced, then the act was judged by its natural and reasonable effect.

The New Deal draftsmen have employed taxing devices to effect regulatory purposes in some of the leading recovery measures. The Agricultural Adjustment Act, the Kerr Tobacco Control Act, the Bankhead Cotton Control Act and the Guffey Coal Bill are examples of this. The probable vice of these measures (apart from the serious delegation question) is that they disclose on their face a detailed plan of regulation of matters of purely local concern and not within the federal province though the rental and benefit payments under the Agricultural Adjustment Act have been defended as purely voluntary bounties. This position may be well taken although it is to be noted that these bounties are for the first time being used for regulatory purposes. With respect, however, to the Bankhead and Guffey Bills, it would seem that the necessary effect of the system of exemptions and rebates therein used is to coerce

recalcitrants into complying with standards of conduct which may not be within the federal power to regulate.

The Harrison Anti-Narcotic Act sustained in the Doremus Case has served as the model for the most recent (excluding the Guffey Coal Bill) of regulatory taxing statutes. This is the National Firearms Act of 1934 (48 Stat. 1236) which attaches a scheme of regulation for the sale of firearms to a license and transfer tax upon such sales. The act requires importers, manufacturers, pawnbrokers and dealer in firearms to register with the collector of internal revenue and to pay a special tax of $300 for pawnbrokers and $500 for the others. It levies a tax of $200 on the transfer of firearms in the continental limited states. A transfer of a firearm must be pursuant to a written order from the person seeking to obtain such article. Within sixty days after the effective date of the act every person possessing a firearm was required to register with the collector the number or other identifying mark of the firearm and the place where it is kept. Manufacturers and importers are required to identify firearms with a number or other identifying mark approved by the Commissioner of Internal Revenue and the obliteration of such marks by anyone is made unlawful. Books, records and returns relating to transfers of firearms are required. A fine of two thousand dollars or imprisonment for not more than five years, or both, is provided for the violation of any requirements of the Act.

The breadth of these regulatory provisions is readily seen at a glance. It may be doubted if all are merely incidental to the collection of the tax and involve only the restraint necessary thereto. However, the similarity of this scheme to that of the Narcotic Act with the closer analogy of firearms to drugs would seem to favor the probability that the act will be sustained.

It is believed that most, if not all, of the proposed N.R.A. measures found in the legislative files suffer from the same infirmity of disclosure of regulatory purpose. A detailed analysis of the more important of these measures will hereinafter be set forth.

B. JUDICIAL LIMITATIONS OF REASONABLENESS OF CLASSIFICATIONS

The power to levy excise taxes is found in Article I, Section 8, Clause 1, in the following language:

> "The Congress shall have power to pay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

The terms, duties, imposts and excises, are generally treated as embracing the indirect forms of taxation contemplated by the Constitution. They are very broad in scope and subject to but one constitutional limitation, that they must be uniform throughout the United States. Flint v. Stone Tracy Co., 220 U.S. 106; 55 L. ed. 389. In Thomas v. United States, 192 U.S. 363, 48 L. ed. 481, in considering the meaning of the words "duties," "imposts" and "excises" the court said:

> "We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture, and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."

The courts have imposed judicial limitations of reasonableness on classifications of persons and objects of excise taxation, but, even so, have taken a practical point of view in applying the test of reasonableness. Evans v Gore, 253 U.S. 245; Barclay v. Edwards 267 U.S. 442; Tyler v. United States, 221 U.S. 497; Klein v. Board of Supervisors, 382 U.S. 19. Thus, even a small difference in the method of conducting a business, or in the characteristics of the objects of taxation has supported the classification. Billings v. United States, 232 U.S. 261, sustained an excise tax on the use of every foreign built yacht. No bases of classification were set forth in the Act. The court recognized the difference between things domestic and things foreign, and their use as a proper basis of classification. In Metropolis theatre Co. v. Chicago, 228 U.S. 61, a graduated license tax on theatres, based on the different prices charged for tickets, was upheld. The court found a basis for classification in the fact that there was a substantial business reason for charging different prices for tickets.

In State Board of Tax Commissioners of Indiana v. Jackson, supra, sufficient differences between independent retailers on the one hand and chain stores on the other to justify their separate classification for tax purposes were recognized. Large chains do a different type of retailing than do small chains or independent retailers.

In a later chain store tax case - Fox v. Standard Oil Co. of N.J., supra, the court recognized a difference of social and economic consequences as a basis for classification. The court said through Mr. Justice Cardozo at page 100:

> "A chain, as we have seen, is a distinct business species with its own capacities and functions. Broadly speaking its opportunities and powers become greater with the number of component links, and the greater they become, the more far-reaching are the consequences, both social and economic. For that reason the state may tax the large chains more heavily than the small ones and upon a graduated basis as indeed we have already held. State Board of Tax Commissioners v. Jackson, 223, U.S. 527 (1931) Liggett v. Sec. 288 U.S. 517 (1933)."

These decisions are consistent with those decided under purely regulatory statutes other than taxing measures where broad social differences have been held to justify classifications. Thus in Sproles v. Binford, 286 U.S. 374, the court in upholding a statute which applied a load limit to trucks that was not applied to buses said through Mr. Chief Justice Hughes at page 396:

> "The peculiar importance to the state of conveniences for the transportation of persons in order to provide its communities with resources both of employment and of recreation, the special dependence of varied social and educational interests upon freedom of intercourse through safe and accessible facilities for such transportation, are sufficient to support a classifications of passenger traffic as distinct from freight."

C. THE SPENDING POWER AND THE CASES OF MASSACHUSETTS AND FROTHINGHAM V. MELON.

The spending power is also based on Article I, Section 5, Clause 1, which confers on Congress the power "to pay the debts and provide for the common defense and general welfare of the United States." Professor Corwin in "The Twilight of the Supreme Court" traces the history of this power. Traditionally, there are two interpretations thereof. The interpretation of Hamilton was the literal and liberal one that the power was not limited to the general welfare embraced within the enumerated powers of Congress, but that its scope was broader. Madison argued for a strict construction of the power.

The Hamiltonian theory has prevailed in practice, as Congress since the beginning has spent money for purposes not within the express or implied grant of powers. Suffice it to say that for practical purposes the power is unlimited. This results from the fact that in the cases of Massachusetts v. Mellon, 262 U.S. 447, and Frothingham v. Mellon, 262 U.S. 447, the Supreme Court denied court status to a tax payer and to the State of Massachusetts to bring an injunction suit to restrain the enforcement of an act of Congress authorizing appropriations of public money on the ground that the Act was unconstitutional.

The practical result of this decision is, as stated by Corwin in "The Twilight of the Supreme Court" at page 178:

> "The moral seems to be that so long as Congress has the prudence to lay and collect taxes without specifying the purposes to which the proceeds from any particular tax are to be devoted, it may continue to appropriate the natural funds without judicial lot or hindrance."

The elimination of the tax payer as challenger, was, however, based on the fact that the Maternity Act of 1921, which was under attack in these cases, was an exercise solely of the spending power - no taxing feature being involved. The tax payer's interest in the moneys in the general Treasury, which are raised partly from taxation and partly from other sources, was too minute and remote. In drafting new N.R.A. legislation, that interest must be kept remote.

The Maternity Act of 1921, involved in the two Mellon cases, was one of the so-called fifty-fifty statutes or cooperative statutes. The better known statutes of the same type are the Morrill Act (Land grants, 12 Stat. 503), the Smith-Lever Act of 1912, (the Agricultural Extension Work Act (38 Stat. 372), the Smith Hughes Act of 1917, (the Vocational Education Act (39 Stat. 929), the Federal Aid Road Act of 1918, (the Federal Highway Act (42 Stat. 212), and the Vocational Rehabilitation Act of 1920 (41 Stat. 735). These statutes embodied the principle of matching state funds with federal funds. The appropriations to carry out the purposes of these acts were made out of any moneys in the Treasury not otherwise appropriated.

The Maternity Act of 1921 (42 Stat. 224) was a typical cooperative statute. It provided for an initial appropriation and thereafter annual appropriations for a period of four years, to be apportioned among such of the

several states as should accept and comply with its provisions, for the purpose of cooperating with them to reduce maternal and infant mortality and protect the health of mothers and infants. It created a bureau to administer the act in cooperation with state agencies which were required to make such reports concerning their operations and expenditures, as might be required by the Federal bureau. Payments might be withheld whenever that bureau should determine that funds had not been properly expended in respect of any state.

One of the principal grounds of attack was that the act was an usurpation of power not granted to Congress by the Constitution - an attempted exercise of the power of local self-government reserved to the states by the Tenth Amendment. While the court stated at the outset that it disposed of the cases for want of jurisdiction without considering the merits of the constitutional questions, nevertheless, it did proceed to a consideration thereof. Thus at page 480 Mr. Justice Sutherland said:

> "Probably, it would be sufficient to point out that the powers of the state are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject....
>
> "What, then, is the nature of the right of the State here asserted and how is it affected by this statute? Reduced to its simplest terms, it is alleged that the statute constitutes an attempt to legislate outside the powers granted to Congress by the Constitution and within the field of local powers exclusively reserved to the States. Nothing is added to the force or effect of this assertion by the further incidental allegations that the ulterior purposes of Congress thereby was to induce the States to yield a portion of their sovereign rights; that the burden of the appropriations falls unequally upon the several States; and that there is imposed upon the States an illegal and unconstitutional option either to yield to the Federal Government a part of their reserved rights or loss their share of the monies appropriated. But what burden is imposed upon the States, unequally or otherwise? Certainly there is none, unless it be the burden of taxation, and that falls upon their inhabitants, who are within the taxing power of Congress as well as that of the States where they reside. Nor does the statute require the States to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.

> "In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several states by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that the question, as it is thus presented, is political and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power."

Section 3 of the Act was attacked as an invalid delegation of legislative power in that it provided that "any state desiring to receive the benefits of the act shall by its agency described in Section 4, submit to the Children's Bureau (the Federal agency) detailed plans for carrying out the provisions of this act, which plans shall be subject to the approval of the board." These plans might contain any provisions reasonably thought to be suitable to accomplish the purposes of the act. The only purpose stated by the act, however, was the promotion of the welfare and hygiene of maternity and infancy.

Legally, the objection would seem to have been well taken. As the court decided the tax payer could not attack the statute, it permitted it to be administered under this lurking invalidity of broad delegation. This suggests the practical advantage of these statutes. All the flexibility sought to be achieved by the code making power delegated to the President in the old N.R.A. Act may be here achieved.

Any regulatory provisions incorporated in these statutes would, like broad delegations of power, be unassailable.

They afford an excellent technique for federal control of state action by requiring the approval by a federal board of state plans.

D. A FOUR PLAN APPROACH.

Although many difficulties attend the effort to draft an N.R.A. regulatory taxing measure without a specific enunciation of objectives, nevertheless, there are several methods of approach to the problem.

The first of these is predicated on the taxing power alone and, although it is revenue raising in purpose, it incidentally has the effect of discouraging certain labor practices considered undesirable. It is a true collateral intent tax.

The second is predicated on the use of the taxing power to raise additional revenue to carry out certain regulatory purposes to be effected by a second bill, a spending or appropriation bill. There would be no direct connection, however, between these two bills. The moneys raised from the imposition of new and valid excises would not be earmarked, but would go into the general treasury and theoretically could be used for any of the purposes of government. The spending measure would in no true sense be a correlative of the taxing bill. The only thing which would connect the two bills would be the implication that the purpose of the taxing bill was to increase the funds in the Treasury so that moneys would be available for the increased expenditures of Government required by the regulatory spending bill.

The third is also predicated on a joint use of the taxing power and the spending power, but here one is a true correlative of the other, as the moneys raised by the taxes levied are either remitted as a bounty under a spending bill, or the equivalent thereof is remitted to the tax payer as a bounty for compliance. The distinction between this and the second method must be kept in mind, as the degree of vulnerability between the two varies considerably.

The fourth is the use of miscellaneous ancillary devices to the foregoing three. These are not classified separately, but are grouped together. In this group are such devices as the denial of the right to deduct from gross receipts sub-standard wages, the use of the commerce power, etc.

E. THE TWO BILL PLAN

It is believed that the advantage of unassailability by the tax payer may be had where the taxing purpose is dissociated from the regulatory by the use of two separate bills, one a taxing measure and the second, an appropriation bill. The tax payer's attack would be limited to the validity of the tax as a valid excise. What appears to be the weakness of the Social Security Bill and the Agricultural Adjustment Act thus would be avoided. There the juxtaposition of a tax with the broad social purposes of the bill (Social Security Bill) and the interweaving of tax and regulatory purposes (Agricultural Adjustment Act) give the taxpayer a sufficiently direct interest to challenge the bill. The proceeds of the tax are directly tied up to the financing of the regulatory program. The Agricultural Adjustment Act, as amended, seeks to correct the recognized weakness. Section 12, in addition to an appropriation of one hundred million dollars out of money in the Treasury, not otherwise appropriated, provides for an appropriation of a sum equal to the proceeds derived from all taxes imposed under Title I of the Act (processing taxes) to be available inter alia for the regulatory purposes of the Act. The provision was inserted in lieu of the original which appropriated the proceeds derived from all taxes imposed under the Act to be available for the same purposes.

It may be doubted whether this expedient will cure the vice as the direct connection between the tax and the regulatory purpose is still apparent on the face of the bill. The Supreme Court has only to read the tax bill to discover this.

The objection may be made to this plan of two bills that the Supreme Court might read the two statutes together and declare them invalid in a taxpayer's suit. With reference to the second approach, it is believed that this possibility is very slight, as there is no direct connection between the two bills. With respect to the third approach, the possibility is a little more immediate, as the two bills are truly correlative and form part of an integral scheme. However, it is not believed that the court is likely to do so. To support this belief is the fact that the court has consistently refused in the past not only to inquire into Congressional motives behind tax measure, valid on their face, but also to pass on the Hamilton-Madison controversy as to the limits of the general welfare clause. Professor Corwin (pages 174-175) points out that in the Pacific Railway Cases (127 U.S. 1), the Gettysburg Railway Case (160 U.S. 668), the Federal Farm Loan Bank Case (255 U.S. 180) and in the Maternity Act Cases (supra), the court consistently avoided this major issue. He states that the latter cases were "the latest - and apparently meant to be the last utterance of the court" on the point and concludes that the spending power has successfully eluded all "constitutional snares."

To be weighed against these considerations is the fact that in Gregg Dyeing Co. v. Quary, 286 U.S. 472, the Supreme Court read several statutes together in order to determine the constitutionality of a state taxing scheme. There a gasoline license tax of six cents per gallon was levied on gasoline imported from other states and kept in storage for a period of twenty-four hours or more, after the same had lost its character as a shipment in interstate commerce. The statute was assailed as violative of the Fourteenth Amendment of the Federal Constitution as it discriminated against gasoline produced by other states, and placed a license tax only upon citizens of the state who imported and stored such gasoline. The Supreme Court of South Carolina held the statute valid because it was complimentary to several other statutes which, when considered with it, imposed the same rate of tax of 6 cents a gallon on all consumers of gasoline in the state, no matter what the origin of, or state in which the gasoline is produced. In affirming judgments dismissing the complaints, the Supreme Court of the United States held that when a State Supreme Court had held that two or more statutes must be taken together, it would accept that conclusion as if written into the statutes themselves. This seems to be the ratio decidendi of the decision though the court did use general language to the effect that it would regard substance rather than form in maintaining rights asserted under the Federal Constitution. This is borne out by the following language, beginning at page 476:

> "In maintaining rights asserted under the Federal Constitution, the decision of this court is not dependent upon the form of a taxing scheme, or upon the characterization of it by the state court. We regard the substance rather than the form, and the controlling test is found in the operation and effect of the statute as applied and enforced by the state. St. Louis South-western western Ry. Co. v. Arkansas, 235 U.S. 350, 362; Hanover Fire Ins. Co. v. Harding, 272 U. S. 494, 509, 510. The operation and effect of this tax act have been determined definitely by the state court in the instant cases. Construing the Act, that court has said:
>
> "'The Act in question may be said to be complementary to the other statutes of South Carolina under which are assessed a gallonage tax on gasoline and other petroleum products. Indeed, it expressly excludes from its provisions all gasoline upon which a like tax has been paid under other statutes. It so declares in its title and specifically designates in its body the statutes, payment of the tax under which exempts from its burden.....
>
> "'In South Carolina, commencing about a decade ago, the Generaly Assembly expressed its public policy as to revenue to be derived from the use of gasoline, vol. 32, Stats. at Large, p. 835. The tax then imposed

was two cents a gallon. In 1925, the tax was increased to five cents, and in 1929, to six cents on the gallon. These statutes, however, only reached "dealers" in this commodity.....

"'Statutes of this nature have been uniformly construed as imposing a tax on the ultimate consumer or user, as will be hereafter shown. Realizing that large users of gasoline either were evading or would evade the payment of the tax imposed under these Acts, by bringing in gasoline in quantities from without the state, and storing it for their own purposes, the Legislature in 1930 enacted the statute under consideration, applying the six cents tax to every person, firm corporation, municipality or any subdivision subject to its terms..... Thus, with the Act of 1930 contemplating the other statutes referred to, all consumers of gasoline in South Carolina pay a tax of 6 cents per gallon, no matter what the origin of, or State in which, the gasoline is produced.....'"

* * * * * * * * *

"The state court answered the contention as to discrimination against interstate commerce by referring to other statutes of the State imposing a tax upon the sale and use of gasoline within the state. The state court said that the Act in question 'taxes all gasoline stored for use and consumption upon which a like tax has not been paid under other statutes. By the kindred Acts all users are taxed.' But appellants question the right to invoke other statutes to support the validity of the Act assailed. To stand the test of constitutionality, they say, the Act must be constitutional 'within its four corners', that is, considered by itself. This argument is without merit. The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one shall be consistent with the restrictions of the Federal Constitution. There is no demand in that Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power. When the Supreme Court of the State has held that two

> or more statutes must be taken together, we accept that conclusion as if written into the statutes themselves. Hobert v. Louisiana, 272 U.S. 312, 317. See Lindsley v. Natural Carbonic Gas Co. 220 U.S. 61, 73. (Italics supplied)
>
> "Reading together the statutes with respect to gasoline taxes, the state court took the view that as to the gasoline tax with respect to sales within the state, the burden actually rests upon the consumer, although not placed upon the consumer directly. No reason is found to challenge this view. Texas Company v. Brown, supra, at p. 479; Panhandle Oil Co. v. Knox, 277 U.S. 218, 222; Indian Motorcycle Co. v. United States, 283 U.S. 570, 579....."

The doctrine of the case is necessarily restricted to its facts which involved state statutes. So far as federal taxing statutes go, it would seem that a different rule would apply. If the Supreme Court has refused to take the step of inquiring into Congressional motives behind tax statutes, as evidenced by Congressional committee reports and debates, it does not seem probable that it will take the still further removed step of reading two statutes together, certainly not two non-truly correlative bills of the second group of our classification.

It is, of course, impossible to weigh a consideration such as that revealed by the Schechter Decision, that when constitutional principles which have only the diminished vitality of political formulas (the separation of powers theory) are violated, by sweeping applications which transcend all reasonable bounds, the Supreme Court will breathe new life into them.

It is interesting to note that Congress recently enacted two bills to carry out the plan of a retirement system for employees of interstate carriers which had been declared unconstitutional by the Supreme Court in Railroad Retirement Board v. Alton, 55 S. Ct. 758. The taxing bill is H. R. 8652, Public No. 400, 74th Congress, which levies an excise tax on carriers of 3½% of the compensation, not in excess of $300 per month, paid to it by its employees, and an income tax of 3½% of the income of each employee of carriers not in excess of $300 per month. The taxes collected are to be paid into the Treasury of the United States as internal revenue receipts (Section 8 (a)). A separate bill (H. R. 8651, Public No. 399, 74th Congress) establishes a retirement system for employees of carriers subject to the Interstate Commerce Act. This bill contains complete regulatory features. Finally, Section 13 authorizes the appropriation of such money from time to time out of the Treasury of the United States as may be necessary to carry the Act into effect.

But for the fact that the taxing bill imposes a levy on a particular group of employees i.e., employees of carriers, who in turn are benefited by the retirement system set up in the second bill, we would classify these bills under our second classification of bills not truly correlative. This one distinction, however, probably places them in our third group of correlative bills. The revenue for the regulatory purposes to be effected in the second group of our classification is to be raised from increases in the rates on present subjects of excise taxation, and from the imposition of new excises on persons and objects generally and not on those in-

tended to be the beneficiaries of the appropriation bill.

F. SPECIFIC RECOMMENDATIONS UNDER THE FOUR PLAN APPROACH AND THE TWO BILL PLAN.

This brings us to our specific plans. Under the first group of collateral motive taxes we suggest four different excise taxes on four privileges: (1) An excise tax on the right to employ minors under fourteen years of age; (2) an excise tax on the right to employ minors between fourteen and sixteen years of age: (3) an excise tax on the right to employ employees at less than a living wage, to be determined administratively for each industry and each section of the country; and (4) an excise tax on the right to employ employees for more than a reasonable number of hours each week, as determined administratively for each industry and section of the country.

The rates of tax should be sufficiently high for both revenue raising and regulatory purposes. The following are recommended: A rate of twenty-five per cent on that part of that payroll which represents the child labor taxed under (1); a rate of twenty per cent on that part of the payroll which represents child labor taxed under (2); a rate of twenty-five per cent on the differential between the sub-minimum wage paid to each employee and the administratively determined minimum under (3) and a rate of fifty per cent on that portion of the payroll which represents compensation for services rendered in excess of the maximum hours of labor similarly determined under (4).

While the method of administrative determination of subsistence wages and maximum periods of labor is open to attack on the ground that it indicates regulatory intent, nevertheless, it seems to be the only practical one. The proposed Johnston and Pharr Bills attempt to fix legislatively minimum wages applicable to all industries. Thus they would legislate a 40 cents an hour minimum wage of general applicability. The economic unsoundness of this provision is obvious when it is considered that the minimum hourly wages fixed by the defunct codes ranged all the way from 15 cents an hour in the peanut and pecan processing industry to 70 cents an hour in the wrecking industry. While it is more practical to fix legislatively maximum hours of labor (the Black Thirty-Hour Bill), nevertheless, there is considerable question as to the economic soundness of an inflexible legislative standard, no matter how broad the exceptions may be.

The method of administrative determination necessarily raises the question of legislative standards. This problem is a specialized one not within the province of this report. It is being worked on by other lawyers. Any standards which are determined sufficient for the purpose of the commerce power will serve the purpose of the taxing power.

From an economic point of view, excise Number 3 may present practical difficulties, as the tendency of employers may be to lower maximum wages to the minimum. The economic power of labor through collective bargaining, strikes, etc., should serve as the corrective.

The minimum tax under (3) may render unnecessary the child labor excises under (1) and (2) since the economic effect of minimum wage legislation is to eliminate child labor.

The tax on child labor under (1) and (2), based on the actual payroll for child labor, is directly proportioned to the extent of the privilege and frequency of its use and would thus not be vulnerable to the objection urged by the Supreme Court in the Child Labor Tax Case (at p. 36) against the tax there invalidated. The tax is not imposed equally, as it was there, on an employer who hires a child for a day and on one who hires a hundred children for a year.

Since the tax is imposed on all employers of child labor whether the employment was wilful or inadvertent, the penalty element and the emphasis on intent (an attribute of criminal law) which was present in the invalidated child labor tax (employers unwittingly employing children were exempt) is entirely lacking. The tax does not suggest a punitive rather than a fiscal purpose as did the old tax.

Simply drawn without any detailed regulations to disclose a paramount and obviously dominant regulatory purpose, the tax would be free of the last of the characteristics which spelled out a penal measure of the invalidated statute.

The classification set up in (1) and (2) is that of employers who employ a certain kind of labor easily distinguishable from adult labor on sociological grounds. The classification which obtains in (3) and (4) is that of employers who pay less than a living wage and work their employees such an unreasonable number of hours as to contribute to unemployment and to necessitate increased federal expenditures for relief purposes. While these classifications are new classifications, unknown to traditional tax law, nevertheless, in the light of the economic and social consequences in periods of economic depression of such practices, they are reasonable ones. In view of the practical point of view taken in determining reasonableness, they would, in all probability, stand the test.

The bill would be simply drawn. It would do nothing more than levy excises. The precedent of Section 211 (2) of the National Industrial Recovery Act would be followed. Under the title "Reemployment and Relief Taxes" a number of excises are imposed which are preceded by no findings of fact, recitals, or enumeration of bases of classification. The effect of these is to arouse a suspicion of regulation which might prove fatal.

This suspicion hovers around the recitals in the Johnston and Pharr drafts of proposed bills. Probably even more serious than this is the interweaving of tax provisions with lengthy recitals of the obligation of the federal government to provide for the relief of the distressed and unemployed, and to reduce government expenditures for the relief of the needy, followed by a direction that the proceeds of the tax be spent for the relief of the needy and distressed. The draftsmen have thus imprudently specified the purposes to which the proceeds from the tax were to be devoted and have given the tax payer the status to raise the constitutional question as to the limits on the power of Congress to provide for the general welfare. This would be involved since there is no express grant of power to Congress to provide for the relief of the unemployed. This question can and ought to be avoided.

While it is our belief that all recitals ought to be omitted, nevertheless, if it is felt that some guide should be given the courts, then it is recommended that a short and innocuous recital, such as that found in the Conner draft, be used. This simply recites that employment of persons at less than a living wage and the spread of unemployment by the exaction from

employees of unreasonably long hours of labor has necessitated appropriations for the relief of the unemployed and those not employed at a living wage.

The effect of the taxes imposed on these employers (assuming that the bases of classification will stand up) has no bearing on their validity. Even if it could be argued (which it cannot in view of the present abundance of unemployed adult labor) that these taxes would destroy the businesses of certain employers, they would still be sustained. "Even if the tax should destroy a business, it would not be invalid or require compensation on that ground alone. Those who enter upon a business take that risk." Alaska Fish Co. v. Smith, 255 U.S. 44, 48, quoted in Magnano Co. v. Hamilton (supra) at p. 46. "When the power to tax exists the extent of the burden is a matter for the discretion of the lawmaker." Fox v. Standard Oil Co. of N.J. (supra) at page 99.

The second method is one of levying new excise taxes to swell the Treasury funds available for a system of federal bounties to the state and to complying employers. The present list of excises is set out on pages 5 and 8 of our outline. The list of articles on which a sales tax is presently imposed could be considerably extended without the necessity of a general sales tax. Even a one or two percent tax on all sales of tangible personal property patterned after the New York State tax could be imposed. (Sec. 391 New York Tax Law.) The purpose of the New York tax is to raise funds for relief expenditures, but it is not labeled in any fashion to indicate this. Funds raised by these excises would not be earmarked.

A cooperative N.R.A. between the Federal government and the States could be financed by the matching of State funds with Federal funds to pay the cost of administration of State N.R.A. agencies. These could be required to submit to the Federal agency for approval detailed plans or codes which, when so approved, could be submitted to the State legislatures for enactment. Since many of the objectives of the N.R.A. (if kept within the judicially defined limits of due process) are within the legislative competency of the states (apart from special state constitutional objections), this plan may have practical value.

Again grants might be made for educational or other purposes conditioned on the enactment by the states of child labor, minimum wage and maximum hour legislation. The Morril Act, 12 Stat. 503, donated public lands to the states upon the condition that all monies derived from the sale of such lands should be invested and the interest thereof appropriated to the support of at least one college where the leading object should be "without excluding other scientific and classical studies and including military tactics to teach such branches of learning as are related to agriculture and the mechanic arts." In the Federal Highway Act of 1934 (48 Stat. 992) in order to prevent further diversion of motor vehicle tax or gas tax funds by state governments to other purposes than highway construction, Congress provided (section 12) that after June 30, 1934 federal aid for highway construction should be extended only to these states that used the amounts then provided by law for such purposes from various forms of state taxation of motor vehicle transportation.

Without going afield to weigh state constitutional difficulties to the enactment of state statutes embodying the fundamental objectives of N.R.A. it does seem clear that such legislation as minimum fair wage standards for women and children would be a proper exercise of the state police power which could

be encouraged by these grants. A well drawn statute such as Article 19 of the New York Labor Law which appears to meet the principal, if not all, the objections of the Supreme Court urged in Adkins v. Children's Hospital, 261 U.S. 525, could serve as the pattern of initial legislation to be fostered by grants.

In addition grants could be given to encourage the enactment of legislation regulating hours of labor and other conditions of labor patterned after the measures already sustained by the Supreme Court in Bunting v. Oregon, 243 U.S. 426 (Oregon ten hour day for all employees of mills, factories and manufacturing establishments in Oregon), Holden v. Hardy, 169 U.S. 366 (Utah eight hour day for working men in underground mines and smelters), Muller v. Oregon, 208 U.S. 412 (Oregon ten hour law for women in mechanical establishments, factories or laundries), Riley v. Massachusetts, 232 U.S. 671 (Massachusetts ten hour law for women in manufacturing and mechanical establishments), and Miller v. Oregon, 236 U. S. 373 (California eight hour statute for women in manufacturing, mechanical, mercantile, laundry, hotel, restaurant, telegraph or telephone express or transportation establishments) Sturgis v. Beauchamp, 231 U. S. 320 (Child labor in certain hazardous occupations).

Direct bounties could be paid to these employers who complied with the approved labor and fair trade standards. These could be paid under contracts with employers in the A.A.A. regulatory manner, or on proof of compliance. There are two Supreme Court cases on the subject of direct bounties: Allen v. Smith, 173 U.S. 389, and United States v. Realty Co., 163 U.S. 427. In Allen v. Smith, supra, the court discussed the nature of bounties. It said at p. 746:

> "Bounties granted by a government are never pure donations, but are allowed either in consideration of services rendered or to be rendered, objects of public interest to be obtained, production or manufacture to be stimulated, or moral obligations to be recognized."

The validity of the Sugar Bounty Act of Congress of March 2, 1895, appropriating money to pay bounties to persons who had been prevented by the repeal of the Act of 1890 from obtaining bounties for the production of sugar before the Act was repealed, or for sugar manufactured during the year ending June 30, 1895, was involved in United States v. Realty Co., supra. The court upheld the constitutionality of the act, regardless of the constitutionality of the earlied Act. It considered at length what debts Congress has power to pay under Article I, Section 8 of the Constitution. This consideration is most pertinent. The court said at page 219:

> "Under the provisions of the Constitution (Art I, Sec. 8), Congress has power to lay and collect taxes, etc., 'to pay the debts' of the United States. Having power to raise money for that purpose, it of course follows that it has power when the money is raised to appropriate it to the same object. What are the debts of the United States within the meaning of this constitutional provision? It is conceded, and indeed it cannot be questioned, that the debts are not limited to those which are evidenced by some written

> obligation or to those which are otherwise of a strictly legal character. The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the government which are thus founded. To no other branch of the government than Congress could any application be successfully made on the part of the owners of such claims or debts for the payment thereof. Their recognition depends solely upon Congress, and whether it will recognize claims thus founded must be left to the discretion of that body. Payments to individuals, not of right or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of moral obligation to support them, have been made by the government by virtue of acts of Congress, appropriating the public money, ever since its foundation. Some of the acts were based upon considerations of pure charity. A long list of acts directing payments of the above general character is appended to the brief of one of the counsel for the defendants in error. The acts are referred to, not for the purpose of asserting their validity in all cases, but as evidence of what has been the practice of Congress since the adoption of the Constitution. See also, among other cases in this court, Emerson v. Hall, 38, U.S. 13 Pet. 409 (10: 223); United States v. Price, 116 U.S. 42 (29:541); Williams v. Heard, 140 U.S. 529 (35:550). The last cited case arose under an act of Congress in relation to the Alabama claims."

Even if Massachusetts v. Mellon (supra) were to be overruled, it would seem clear from the Realty Company Case that bounties paid to employers contracting with the federal government to comply with certain labor and trade standards could be successfully defended as the payment of debts which rest upon both a legal and an equitable obligation of the government.

It cannot be argued that these bounties constitute a method of coercing employers into compliance with the Federal standards, or of penalizing non-complying employers. They impose no obligation or burden on employers. If the ulterior purpose of Congress is to tempt them to yield, that purpose may be as effectively frustrated here as under the Maternity Act by the same expedient of not yielding. If they do not want the bounty, they are not compelled to accept it.

Practically, a system of direct bounties to employers which is practical is difficult to work out. The regulation of industry requires almost constant supervision because of factors which vary from day to day. In this respect such regulation differs from that of agriculture where only a periodic supervision is required. Most of the direct bounty plans which we have examined appear to us to suffer from the infirmity of impracticability. This seems particularly true of the suggested bounties to employees equivalent to the difference between applicable standards and sub-standard wage and hour scales and to complying employers equal to the difference between applicable standards and average sub-standard wage and hour scales paid by non-complying employers in same industry (Conner outline - Spending Power - 2 (a).

A practical use of bounties may be made under our third classification. The tax bill and the appropriation bill would here be true correlatives. An excise tax could be levied on the gross profits of industry. This tax could be at a fixed rate of five to ten per cent, or the rate could be determined by the ratio the total unemployment relief expenditures for any given year bears to the total gross profits of all industry for the same period. The appropriation bill would provide for a bounty to each complying employer in an amount equivalent to the tax paid, or a certain percentage thereof. This would in effect amount to a remission of the tax or a substantial percentage thereof. The burden of proof would be on the employer to show full compliance with the federal standards.

The fourth group is the miscellaneous one. The income tax might be amended to deny deductions for wages paid below a fixed minimum, preferably determined administratively. Net income is a purely statutory concept and is what Congress says it is. The classification of employers who pay less than a living wage should support the different treatment in respect to deductions. No right preserved in the Constitution is impaired by the placing of a limit upon deductions or by denying them altogether. Burnett v. Thompson Oil & Gas Co., 285 U.S. 301, New Colonial Ice Co. v. Helvering, 292 U.S. 435, Helvering v. Ind. Life Ins. Co., 292 U.S. 371, 381.

Without specific consideration of other proposed plans, it is believed that those herein set forth are the most practical which have been offered. In our opinion they have the best chance of withstanding an attack on constitutional grounds.